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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CRIMINAL JURISDICTION

CRIMINAL APPEAL NO.758 OF 2005

Sakharam Shivram Shinde)
Convict No.C/12467)
Yerawada Central Prison)
Pune.).. APPELLANT

VERSUS

The State of Maharashtra)
(At the instance of Dindoshi Police)
Station, C.R.No.580/90)).. RESPONDENT

Mr.D.G. Khamkar for the Appellant.

Smt.V.R. Bhosale, Additional Public Prosecutor,
for the Respondent.

CORAM: V.G. PALSHIKAR, ACG.C.J. &
SMT. NISHITA MHATRE, J.

DATED: 3RD OCTOBER 2006

ORAL JUDGMENT : (PER SMT.MHATRE, J.)

. The Appellant has challenged the judgment and order dated 27th November 2001 passed by the Additional Sessions Judge, Greater Bombay, convicting him under Section 302 of the Indian Penal Code and sentencing him to undergo life imprisonment.

2. We are faced in this case with a situation where the Appellant is in custody for the last sixteen years for an alleged offence that he committed in 1990. The gross delay of ten years in completing the trial has led to untold misery for the accused.

3. The case of the prosecution is based entirely on several dying declarations made by the victim at various points of time. Most of these statements are recorded, while one is an oral declaration given to her brother, PW6. The case of the prosecution is that the Appellant often physically and mentally tortured the victim. He beat her at the least possible pretext. The victim had narrated her plight to her parents and brother. Her family had tried to persuade the Appellant to behave himself and not to torture the victim. She had delivered a girl child two months before the incident occurred. On her return to her marital home with the baby, the Appellant beat her as according to him she had returned when the child was too small. It is the case of the prosecution that on 4th December 1990, when the Appellant came home from work in the morning, the victim was asleep and was wearing a sweater as she was not well. The Appellant woke her up and beat her as he suspected that she had wronged him. A lady who was their neighbour patched up their quarrel. Then at about 3.00 p.m. when the victim was asleep, the Appellant woke her, kicked her and directed her to leave the house immediately. As a result of the kick, she fell down and disturbed a bottle containing kerosene, the contents of which fell on her saree. The Appellant set her ablaze

by igniting her saree petticoat. Responding to the victim's cries for help, the Appellant extinguished the fire by putting a bedsheet around her. He then admitted her to hospital where the victim succumbed to the injuries on 8th December 1990 i.e. after four days of the incident.

4. The prosecution has relied on nine witnesses to establish the charge against the Appellant. PW1, PW2 and PW4 are the Medical Officers who attended the victim. PW5 is the Doctor who performed the post mortem examination on the dead body of the victim. PW3 is the panch witness who has deposed to the seizure panchanama and the spot panchanama. The brother of the victim has been examined as PW6. PW7 is the Special Executive Magistrate who recorded the dying declaration which is at Exhibit 27. PW8 is the Police Inspector who recorded another dying declaration which is at Exhibit 24. PW9 is the Investigating Officer.

5. At Exhibit 10A is a copy of an extract from the Casualty Register of the hospital. The time of admission of the victim is shown as 4.13 p.m. on 4th December 1990. She has informed the Doctor attending her that her husband, who was present with her to admit her in the hospital, had kicked her and burnt her by pouring kerosene over her body and setting her on fire.

This extract from the Casualty Register has been proved by PW2 who was present on duty on that day at the relevant time. In the case papers, the history of the patient has been recorded as being "burnt by husband". The case papers have been proved by PW1.

6. The next document which indicates how the victim was burnt is Exhibit 24. This document is a dying declaration which was recorded on 4th December 1990 at about 4.13 p.m. This dying declaration has been recorded by the Special Executive Magistrate, PW7 The document has been proved by PW2. In this declaration, the victim has stated that her husband kicked her at about 3.00 in the afternoon. She fell on the floor which resulted in kerosene from a bottle kept under the bed falling on her saree petticoat. The husband ignited the match stick and set her on fire. The husband then wrapped a bedsheet round her and extinguished the fire. The husband then took her to the hospital. PW2 has proved this statement. He has stated that after the history was recorded in the case papers, the victim’s statement which is at Exhibit 24 was recorded. He has recorded that the patient was conscious.

7. Another dying declaration has been recorded at 6.40 p.m. which is at Exhibit 27. This declaration was recorded by the Police Constable, PW8. Surprisingly,

this statement of the victim is detailed although it was recorded more than two hours after the earlier one. She has spoken about the torture she suffered at the hands of the Appellant as also the fact that he suspected her fidelity. While speaking about the incident which occurred on 4th December 1990, she has stated that after her husband went to the shop at about 10.00 a.m., she went to sleep for some time. She then had her food and went to sleep again. Her husband returned at 3.00 p.m. and kicked her saying that she should leave the matrimonial home, leaving her daughter behind. As a result of this kick, she fell off the bed. He continued to kick her. She fell on the bottle of kerosene which was under the bed. The kerosene emptied over her saree petticoat. She then told him despairingly that he should deal with her once and for all. The husband then set fire to her saree petticoat. She shouted and tried to extinguish the fire. The husband threw a bedsheet round her and extinguished the fire. The husband then admitted her to hospital. This declaration has an endorsement "Patient conscious at time of examination and could give statement".

8. The other dying declaration which the victim has given is to her brother PW6. He has stated that he reached the hospital between 6.00 and 6.15 p.m. and that the victim had told him that she had sustained

injuries because the kerosene bottle which was under the bed broke when she fell on the floor. Her husband had then set her on fire. This witness states that he went to the police station and his statement was recorded on the next day i.e. on 5th December 1990. The victim succumbed to her injuries on 8th December 1990. He has stated that the victim was in a position to talk till her death. However, in the cross-examination, he has admitted that he reached the hospital between 7.00 and 7.15 p.m.

9. We are thus faced with several declarations made by the victim. Although there is a common thread running through all these declarations that the Appellant has set her on fire, there is an obvious improvement in each of the statements with the passage of time. It is difficult to accept that the victim would be better placed to give all details and particulars of her relationship with the Appellant when the dying declaration at Exhibit 27 was recorded. Furthermore, there is no evidence on record as to why, when she was in hospital upto 8th December 1990 i.e. the day she succumbed to her injuries, no statement was recorded immediately prior to her death. The Special Executive Magistrate who has recorded the statement which is at Exhibit 24 has stated that his son reduced into writing whatever the victim had spoken. He has

admitted that he did not know Marathi. He has said that the Doctor came into the room, wrote something on the statement which was recorded and left. However, the witness has stated that he has read the statement recorded by his son and it was correct. The witness has admitted in cross-examination that he did not know how to read or write Marathi and that his son had read over the contents to him. PW8, who is the police constable, has deposed that he recorded the statement of the victim which is at Exhibit 27.

10. In our opinion, there are various improvements made in the dying declarations and they are not consistent with each other. There is no explanation as to why the declaration which is at Exhibit 27 was recorded when one was which had been recorded at about 4.13 p.m. which is at Exhibit 24 was already available. PW8 the Constable who claims to have recorded the dying declaration at Exhibit 27 has made contradictory statements in his testimony regarding the time when Exhibit 24 and Exhibit 27 were recorded. Furthermore although he claims to have recorded Exhibit 27 it bears the signature of the Special Executive Magistrate. There is no explanation as to why it was so endorsed. In such a situation, we have no option but to discard the dying declarations. There is sufficient evidence on record to indicate that from the time the victim was

admitted in hospital till Exhibit 27 was recorded, here relatives had met her. The possibility of the victim being tutored cannot be ruled out. Apart from this, there is evidence on record showing that the husband had in fact extinguished the fire and taken her to hospital. If what the prosecution says is correct that the Appellant had set her ablaze, there was no reason for him to either extinguish the fire or to admit her to hospital. Merely because the Appellant had ill-treated the victim, there is no reason to believe that he had set her on fire. In such circumstances, we are of the opinion that the Appeal must succeed.

11. Appeal allowed. Judgment and order dated 27th November 2001 passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No.240 of 1991 is set aside. The Appellant be released forthwith, if otherwise not required in law.

(V.G.PALSHIKAR, Acg.C.J.)

(SMT.NISHITA MHATRE, J.)